In the Supreme Court of the United States

October Term 1955

No. 257

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK,

Respondents.

Brief For Respondent, Albert Eufrazia

On Writ of Certiorari to the Supreme Court of the State of California

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QUESTION PRESENTED FOR REVIEW

Does the Federal Employers' Liability Act apply to an upgraded carman's helper who was employed by a common carrier by railroad, engaged in interstate commerce, in the freight car department of its general shops where old freight cars were repaired and new freight cars were assembled when the employee performed repairs until June 13, 1951, and assembled new cars from June 13, 1951 until he was injured on July 10, 1951?

STATEMENT OF THE CASE

The Respondent, ALBERT EUFRAZIA, started to work for the Petitioner, SOUTHERN PACIFIC COMPANY, in September, 1950, at which time he was a carman's helper in Petitioner's car shop No. 9 at Sacramento, California. In March, 1951, he was promoted to an upgraded carman's helper. An upgraded carman's helper is a man who has been qualified by the management and the Brotherhood of Railway Carmen of America to perform all of the tasks required of a carman. (R 426, R 460) These tasks included the assembling of new cars, the rebuilding of old cars and the repair of old cars. (R 460, R 433) Prior to June 13, 1951, Respondent had performed repairs on old cars. (R 424) On June 13, 1951, Respondent was given the task of reaming holes in ends which were to be installed on gondola cars. (R 423, R 458) These gondola cars were being assembled at car shop No. 9. Respondent remained at this task until he was injured on July 10, 1951.

From the time that he was first employed until the time that he was injured Respondent was continuously employed at car shop No. 9. Car shop No. 9 was the designation for the freight car department of Petitioner's general shops in Sacramento, California. This department of the shops did all of the work pertaining to freight cars and this was its exclusive function. (R 501) This work consisted of assembling new freight cars, rebuilding old cars and repairing freight cars. Mr. Harry Hitke was in charge of car shop No. 9 and everyone in car shop No. 9 was responsible to Mr. Hitke. Mr. Hitke had the authority to transfer the men in car shop No. 9 from the task of assembling new cars to the task of repairing old cars, and vice versa, as he saw fit, (R 502, R 511), and from time to time did so. (R 511, R 512) The Respondent's foreman, Mr. Fagan, was directly under Mr. Hitke and simultaneously had charge of men who were repairing old cars and of men who were

assembling new cars. (R. 523) Car Shop No. 9 was one integrated unit and was not subdivided into two separate entities.

ARGUMENT

I

Respondent's Duties Furthered Interstate Commerce.

The Respondent was an upgraded carman's helper. By definition an upgraded carman's helper means a railroad worker who is qualified, eligible and required to perform tasks pertaining to the repair, maintenance and upkeep of railroad cars, as well as tasks pertaining to the assembling of railroad cars. Respondent's duties while employed by the Petitioner as an upgraded carman's helper from time to time required him to repair railroad cars. The courts have uniformly held that repair work is under the FELA as amended in 1939. *Maxie* v. *Gulf M & O Railway Company*, 358 Mo. 1100, Certiorari denied 338 U.S. 823; *Southern Pacific Company* v *Industrial Accident Commission*, 88 C.A. 2d, 569; *Southern Pacific Company* v *Industrial Accident Commission*, 19 Cal 2d 271; *Southern Pacific Company* v. *Industrial Accident Commission*, 19 Cal 2d 283.

As long as some of the tasks which are included in a railroad worker's duties further interstate commerce he is under the FELA regardless of how remote from interstate commerce the task he is performing at the time he is injured happens to be. *Wright* v. *New York Central*, 33 N.Y. S. 2d, 531, affirmed 43 N.E. 2d, 97, Certiorari denied 317 U.S. 668; *Zimerman* v. *Scandrett*, 57 Fed Supp 799; 10 A. L.R. 2d 128.

The Respondent is a railroad man. In the summertime when workers in other industries are on Daylight Saving

Time, Respondent remains on Pacific Standard Time, which he refers to as "railroad time". His very language is in the vernacular of a railroad man. His social security benefits are administered under the Railroad Unemployment Insurance Act[1] and the Railroad Retirement Act[2], the former of which is geared to FELA by its subrogation practices. When Respondent or his family are ill or injured they are treated in a railroad hospital by railroad doctors. He belongs to a railroad brotherhood which has a contract with the railroad. His labor relations are governed by the Railway Labor Act[3]. His seniority roster is composed of railroad men. His associates are all railroad men. His bosses are all railroad men. He and his fellow workers are constantly working around railroad tracks and railroad equipment, the operation of which is governed by railroad practices and rules. He is exposed to the same hazards and he has the same problems as any other railroad man, and this sets him apart from workers in other industries.

The Respondent's duty is to provide Petitioner with freight cars for its trains and to keep them rolling. This is as integral a part of interstate transportation as the part played by the men who operate the trains. Without Respondent Petitioner's freight trains would not roll for long.

(1) 53 Stat. 1113 (1939) as amended; 45 USC a. 351-367.

(2) 49 Stat. 967 (1935); 50 Stat. 307 (1937); 60 Stat. 722 (1946); 63 Stat. 576 (1948); 45 USC a. 228.

(3) Railway Labor Act of May 20, 1926, c. 347, a. 1, 44 Stat. 577; as amended (1934), 48 Stat. 926; (1934) 48 Stat. 1185; (1936) 49 Stat. 1921; (1940) 54 Stat. 785-786; (1948) 62 Stat. 991; (1949) 63 Stat. 107; 45 USC a. 151-188.

II

CAR SHOP No. 9 IS AN INTEGRATED UNIT ENGAGED IN INTERSTATE COMMERCE.

Respondent at all times worked in car shop No. 9. Car shop No. 9 was the freight car department of the Petitioner's general shops in Sacramento, California. Car shop No. 9 physically was all in one contiguous area of space. Car shop No. 9 engaged in repairing freight cars, in rebuilding old freight cars and in assembling new freight cars. All of this work was done in the same area. Men were assembling new cars on tracks which were adjacent to tracks on which repairs were being made.

Both assembling new cars and repairing old cars involved tasks which are alike. These tasks both require work involving air brakes, trucks, underframes, sides, ends, safety appliances, roofs, draw bars, etc. Many of the same tools and pieces of equipment are used for both assembling new cars and repairing old cars. The men who were engaged in assembling new cars had the same skills and were exposed to the same hazards as those who were repairing old cars. They were used in either task as the need arose. The supervision required for assembling new cars and for repairing old cars both had to have the same technical knowledge. In fact, Mr. Eagan, the foreman immediately over the Respondent at the time he was injured, simultaneously supervised work on the assembling of new cars and on the repair of old cars. (R 523) Mr. Hitke was the supervisor of car shop No. 9 and could shift the men from task to task as the need arose, and the men, subject to their seniority roster, could shift from task to task, which according to the reasoning of *Terminal Railroad Association of St. Louis* v *Fitzjohn*, 165 F 2d 473, makes FELA applicable.

Car shop No. 9 operated as an integrated unit and was an intimate part of interstate transportation. The function

of car shop No. 9 was to provide Petitioner's trains with freight cars, and to maintain them in condition. Without car shop No. 9 Petitioner's freight trains would not roll for long.

III

ASSEMBLING FREIGHT CARS FURTHERS INTERSTATE COMMERCE.

The FELA should apply even in Respondent's sole duty was to assemble new cars. At the moment of his injury Respondent was assisting in assembling gondola cars from new parts. These cars when assembled were to be used by the Petitioner to supplement its existing rolling stock. In order to carry on its business as a common carrier by railroad. Petitioner was assembling these gondola cars, The assembling of these cars was as necessary a part of interstate transportation as keeping them in repair after they were assembled.

Soundly reasoned cases hold that there is no magic in the phrase "New consruction" which should preclude a railroad worker from asserting the remedy which Congress intended him to have. These cases hold that FELA applies to railroad workers who are assisting in providing the railroad with new equipment which it requires for interstate transportation. *Erickson v. Southern Pacific Company*, 39 Cal 2d 374, Certiorari denied 344 U.S. 897; *Trucco* v *Erie Railway Co.*, 353 Pa 320; *Baird v. N. Y. Central*, 299 N. Y. 2d 13; *Agostino* v. *Pennsylvania Railway*, 50 Fed Supp 726.

IV

UNIFORMITY REQUIRES THAT FELA APPLY.

The assembling of new cars required the same type of men and supervision and many of the same type of tools and equipment as was required for the rebuilding of old cars and for the repair of old cars. The men engaged in the assembling of new cars were of the same classification (carmen and their helpers) and had the same skills and abilities as the men engaged in the rebuilding of old cars and in the repair of old cars. The hazards involved in the assembling of new cars were as great and of the same type as the hazards involved in rebuilding old cars and in repairing old cars.

The same management supervised the assembling of new cars and the rebuilding of old cars and the repair of old cars. Actually the same personnel assembled new cars, rebuilt old cars and repaired old cars.

To avoid the perplexing problem of distinguishing between what is the assembling of a new car and what is the repair of an old car, it is necessary to hold that all of these men are under the Federal Act, otherwise the following problems could arise: Suppose that a wreck has caused a draw bar to be torn out of a car and that the car is shopped, and that the only thing necessary to be done to the car is to add a new draw bar. Is that new construction or repairs? Suppose that not only a new draw bar is added but that new sides and ends are also added. Is that new construction or repairs? Suppose that a wreck has caused everything to be knocked from a car except the underframe and the trucks and the car is rebuilt using the old underframe and trucks. Is that new construction or repairs? Suppose that a wreck knocks everything from a car except the trucks and the car is reconstructed from the trucks up. Is that new construction or repairs? Suppose that only the

wheels are left and a car is reconstructed from the wheels up. Is that new construction or repairs? The same supervisors and personnel would perform the above tasks as would perform the work at issue in the case now before the court and their hazards would be the same as those to which Respondent was subjected.

The only way to avoid confusion is to hold that all of these carmen and their helpers have the same remedy irrespective of whether they happen to be assembling new cars, rebuilding old cars or repairing old cars at the time they are injured.

V

RAILROAD EMPLOYEES ENGAGED IN THE SAME ACTIVITY SHOULD BE UNIFORMLY TREATED THROUGHOUT THE UNITED STATES.

The work of a railroad worker engaged in interstate commerce affects the United States as a whole and is a national problem. Railroad companies spread over many states and litigation concerning them can best be handled through a Federal remedy rather than a remedy confined to one state.

The problems of Respondent's relations with his management and his social security are all regulated by Federal legislation which is solely applicable to railroad workers. The problem of his being injured on the job is also a problem which concerns the United States as a whole. This problem should be handled by the Federal Government and not be left to the caprice of the legislatures of the various states which are designed to deal with local problems.

The philosophies of the various states as to the value of life and limb varies according to their respective economies, populations and backgrounds. The legislation of the various

states as to workmen's compensation varies not only as to the amount of award recoverable by the injured workman, or in death cases by his surviving dependents, but also as to defenses available to the employers, coverages, exemptions and medical benefits.

Compensation rates for workmen temporarily disabled from working range from maximum benefits of $40.00 weekly (based on a percentage of average weekly earnings) in the states of Minnesota[4] and California[5], to maximum benefits of $25.00 weekly in the states of Arkansas[6] and Mississippi[7]. Death benefits for surviving dependents vary from a maximum recovery of $17,500.00 in Minnesota[8], to a maximum recovery of $6,000.00 in Wyoming[9].

Medical coverage for the injured workman ranges from full benefits for either accident or industrial disease[10] to a limit of 90 days treatment and a maximum of $1,000.00 medical expenses in Alabama.

Non-resident alien dependents are completely excluded from any benefits by reason of the death of a wage earner by the statutes of the five states of Alabama, New Mexico, Pennsylvania, South Dakota and West Virginia. Most of the other states provide for reduced benefits for non-resi-

(4) Minnesota statutes 1953, Ch. 176, Sec. 176.101 as amended by L. 1955, Ch. 615.

(5) California Labor Code, Sec. 4460.

(6) Initiated Act No. 4, adopted by the electorate in November, 1948, amending in its entirety Act No. 319, Acts of 1939, as amended and effective December 3, 1948, Sect. 10.

(7) H. B. 351, approved April 13, 1948, effective January 1, 1949, Sect. 6 as amended by L. 1950, H. B. 433, effective April 6, 1950.

(8) Minnesota statutes 1953, Ch. 176, Sec. 176.111, Sub. 20.

(9) Wyoming Laws 1951, Ch. 143, Sect. 42, 43.

(10) By statute ten states provide for full medical coverage: California, Connecticut, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Dakota, Washington and Wisconsin.

dent alien dependents, and only the five states of Connecticut, Minnesota, Ohio, Tennessee and Texas place nonresident alien dependents on the same footing as resident dependents.

The defenses available to an employer to defeat a workman's claim vary from intoxication and intent to injure self, permitted by statute in a majority of states[11], to willful failure to use safety devices, which is a complete defense in thirteen states[12] and a penalty factor reducing the award recoverable in eight states[13].

Other defenses provided by some workman's compensation statutes are injury inflicted by third person for personal reasons[14], violation of law or failure to perform statutory duty[15], and willful disobedience of safety regulations[16].

By the statutes of six states employees of common carriers or railroads are excluded from the coverage of the workman's compensation acts[17]. In each of these states the

(11) The defense of intoxication is not present in the statutes of Arizona, Illinois, Massachusetts, Michigan, Missouri, Montana, Oregon, Pennsylvania, Texas, Washington and Wyoming. Intent to injure self is not statutorily a defense in Connecticut, Illinois, Michigan, Missouri, Montana, Nebraska, New Hampshire, Texas and Wyoming.

(12) Alabama, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Dakota, Tennessee, Vermont, Virginia and Washington.

(13) Colorado, Kentucky, Montana, New Mexico, North Carolina, South Carolina, Utah and West Virginia.

(14) Alabama, Delaware, Georgia, Iowa, Minnesota or Pennsylvania.

(15) Alabama, Delaware, Indiana, New Hampshire, Pennsylvania, South Dakota, Tennessee.

(16) Alabama, Florida, Georgie, Indiana, Louisiana, Virginia, and West Virginia.

(17) Florida, North Carolina, South Carolina, Texas, Virginia, Washington.

remedy of an injured railroad employee is to file an action based on negligence against his employer. The problem as recognized in these states is succinctly stated in the statute of Washington which provides,

> "Inasmuch as it has proved impossible in the case of employees of common carriers by railroad, engaged in maintenance and operation of railways doing interstate . . . . and intrastate commerce, and in maintenance and construction of their equipment, to separate and distinguish the connection of such employees with interstate . . . . commerce from their connection with intrastate commerce, ... the provisions of this title shall not apply to work performed by such employees . . . ."[18]

There is nothing to prevent any of the states from eliminating or making their compensation acts less liberal in the future, both as to the amount of the award, and as to the allowance of various defenses, or in determining which conditions are not industrial injuries. The railroad worker has no guarantee that the various states won't so act due to a reversal of the modern trend of thought or to local politics.

([18]) Rev. Code of Washington, Title 51, Section 51.12.080.

VI

FELA AFFORDS BETTER REMEDY FOR RAILROAD WORKERS THAN WORKMAN'S COMPENSATION ACTS.

The Petitioner's brief leads one to the belief that it wishes the Respondent's claim to be determined under the Industrial Accident Commission because of some humanitarian concern for the railroad worker. The real reason that it prefers the Industrial Accident Commission to the FELA is that awards are much higher under the FELA than under even the relatively liberal workman's compensation act of the state of California. Not only is the allowance for disability considerably less under workman's compensation, but no allowance can be made in a compensation award for physical or mental pain and suffering which does not interfere with earning capacity. *Shaw* v. *Salt River Valley Water Users Association*, 69 Ariz. 309, 213 P 2d 378; *Linderman* v. *State Industrial Accident Commission*, 183 Ore. 245, 192 P 2d 732. Disfigurement is compensable by statute in only twenty-seven states[19], and generally to a limited extent only insofar as it interferes with the ability to secure or retain employment. Impotency is a non-disabling injury which is not compensable under workman's compensation statutes. *Hyett* v. *Northwestern Hospital*, 147 Minn. 418, 180 N.W. 552; *Farnum* v. *Garner Paint Works and Bleachery*, 229 N.Y. 554; *Morris* v. *Muldoon*, 229 N.Y. 611, 129 N.E. 928; *Smith* v. *Baker*, 157 Okla. 155, 11 P 2d 132.

The situation of an injured railroad worker not having a compensable claim under the FELA is very rare. Accidents don't just happen, they are caused, and in almost every

(19) Alabama, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming.

instance a contributing cause has been the negligence of the railroad company in its failure to provide reasonably safe equipment, or a reasonably safe place to work, or by the fault of a fellow employee, or by the failure of the railroad company to supply an adequate number of men, or by the carelessness of the railroad in supervising and managing the work.

Neither the administration of the Industrial Accident Commission nor of our Court system is free to the taxpayers. However, economy should not be the primary concern where justice is involved. To the credit of our law and of our legal system, justice works better in our courts of law, which are founded upon democratic processes, than it does in any administrative agency. Our law courts not only have the benefit of the common sense and good judgment of juries, but also have the traditional judicial safe guards.

The law works best when both sides of the controversy have professional attorneys striving for their respective causes. Lawyers have expenses in maintaining their offices and in living. In order for the legal profession to exist it must have fees to meet these expenses. The FELA through contingent fee agreements offers an incentive to lawyers to take cases on behalf of injured railroad employees who otherwise often would not be able to pay a lawyer for his time in preparing and trying his case. The fee offered by the Industrial Accident Commission is even lower than the compensation received by the injured worker. The only law firms that can make a reasonable living out of an Industrial Accident Commission practice are those which defend insurance companies on a mass production basis.

The FELA not only affords a practical method for a poor man to retain the services of an attorney, but it also solves the problem of financing law suits. Personal injury law suits, as well as workman's compensation cases, often in-

volve scientific problems of medicine and engineering. A railroad can afford to retain scientific experts to assist in the preparation of their case and to testify on their behalf. The contingent fee arrangement, permissible under the FELA, enables the plaintiff's attorney to advance the cost of retaining an expert to present the plaintiff's side of the case. The Industrial Accident Commission offers no solution to this problem to the injured man, who is often obliged to listen to the defendant's expert without the benefit of presenting an expert on his own behalf.

No remedy for a wronged person has as yet been devised as effective as recourse to our courts of law and under our system there is nothing more salutary in encouraging railroads to use due care as fear of a first class law suit.

CONCLUSION

The FELA is a suitable remedy with which Respondent is perfectly happy and there is no sound reason for excluding Respondent's case from the FELA where it logically belongs.

DATED: Sacramento, California

April 12, 1956.

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